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FEB 19 2016

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *ACC* DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RAUL ARELLANO,

Plaintiff,

v.

DR. K. DEAN; S. PASHA; M.D. S.
ROBERTS; M. GLYNN; J. LEWIS;
CALIFORNIA CORRECTIONAL
HEALTH CARE SERVICES,

Defendants.

Case No.: 3:15-cv-02247-BEN-JLB

ORDER:**(1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS****(2) DISMISSING COMPLAINT FOR
FAILING TO STATE A CLAIM**

Plaintiff Raul Arellano, currently incarcerated at Richard J. Donovan Correctional Facility ("RJD") in San Diego, California, and proceeding *pro se*, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. (Doc. No. 1). Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when he filed his Complaint; instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a). (Doc. No. 2).

I. Plaintiff's Motion to Proceed IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee. 28

1 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire
 2 fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
 3 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a
 4 prisoner and he is granted leave to proceed IFP, he remains obligated to pay the full
 5 entire fee in "increments," *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015),
 6 regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) &
 7 (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

8 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
 9 ("PLRA"), prisoners seeking leave to proceed IFP must submit a "certified copy of the
 10 trust fund account statement (or institutional equivalent) for the . . . six-month period
 11 immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v.*
 12 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement,
 13 the Court assesses an initial payment of 20% of (a) the average monthly deposits in the
 14 account for the past six months, or (b) the average monthly balance in the account for the
 15 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
 16 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner then
 17 collects subsequent payments, assessed at 20% of the preceding month's income, in any
 18 month in which the prisoner's account exceeds \$10, and forwards those payments to the
 19 Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

20 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust
 21 account statement pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. The
 22 Court has reviewed Plaintiff's trust account activity which shows he has a current balance
 23 of \$0.00. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be
 24 prohibited from bringing a civil action or appealing a civil action or criminal judgment
 25 for the reason that the prisoner has no assets and no means by which to pay [an] initial
 26 partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a
 27 "safety-valve" preventing dismissal of a prisoner's IFP case based solely on a "failure to
 28 pay . . . due to the lack of funds available.").

1 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP and assesses no
 2 initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of
 3 the filing fee owed must be collected and forwarded to the Clerk of the Court pursuant to
 4 the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

5 **II. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

6 Plaintiff alleges that Defendants provided him inadequate medical care in violation
 7 of the Eighth Amendment.

8 **A. Standard of Review**

9 Notwithstanding Plaintiff's IFP status or the payment of any filing fees, the PLRA
 10 also requires the Court to review complaints filed by all persons proceeding IFP and by
 11 those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of,
 12 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 13 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 14 practicable after docketing." 28 U.S.C. §§ 1915(e)(2), 1915A(b). Under these statutes,
 15 the Court must sua sponte dismiss any complaint, or any portion of a complaint, which is
 16 frivolous, malicious, fails to state a claim, or seeks damages from defendants who are
 17 immune. 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b); *see also Lopez v. Smith*, 203 F.3d 1122,
 18 1126-27 (9th Cir. 2000) (en banc) (discussing § 1915(e)(2)); *Rhodes v. Robinson*, 621
 19 F.3d 1002, 1004 (9th Cir. 2010) (discussing § 1915A(b)).

20 All complaints must contain "a short and plain statement of the claim showing that
 21 the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
 22 not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by
 23 mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 24 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Determining whether a
 25 complaint states a plausible claim for relief [is] . . . a context-specific task that requires
 26 the reviewing court to draw on its judicial experience and common sense." *Id.* The
 27 "mere possibility of misconduct" falls short of meeting this plausibility standard. *Id.*; *see*
 28 *also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

1 “When there are well-pleaded factual allegations, a court should assume their
 2 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
 3 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
 4 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
 5 allegations of material fact and must construe those facts in the light most favorable to
 6 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
 7 section 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6).”).

8 However, while the court “ha[s] an obligation where the petitioner is pro se,
 9 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 10 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
 11 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
 12 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents*
 13 *of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory
 14 allegations of official participation in civil rights violations” are simply not “sufficient to
 15 withstand a motion to dismiss.” *Id.*

16 **B. Application**

17 “Section 1983 creates a private right of action against individuals who, acting
 18 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*
 19 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
 20 substantive rights, but merely provides a method for vindicating federal rights elsewhere
 21 conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks
 22 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)
 23 deprivation of a right secured by the Constitution and laws of the United States, and (2)
 24 that the deprivation was committed by a person acting under color of state law.” *Tsao v.*
 25 *Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

26 The Court finds that Plaintiff has failed to state a plausible Eighth Amendment
 27 claim against any of the named Defendants. Only “deliberate indifference to serious
 28 medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . .

proscribed by the Eighth Amendment.” *Estelle v. Gamble*, 429 U.S. 97, 103, 104 (1976) (citation and internal quotation marks omitted). “A determination of ‘deliberate indifference’ involves an examination of two elements: (1) the seriousness of the prisoner’s medical need and (2) the nature of the defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991) (quoting *Estelle*, 429 U.S. at 104), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc).

First, “[b]ecause society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (citing *Estelle*, 429 U.S. at 103-104). “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin*, 974 F.2d at 1059. “The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a ‘serious’ need for medical treatment.” *Id.* at 1060 (citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir. 1990); *Hunt v. Dental Dept.*, 865 F.2d 198, 200-01 (9th Cir. 1989)).

Plaintiff alleges to suffer from a seizure disorder, as well as nerve damage from an “assault [he] suffered in November 2010.” (See Compl. at 8.) The Court finds these allegations sufficient to plead an objectively serious medical need. *McGuckin*, 914 F.2d at 1059.

However, even assuming Plaintiff’s medical needs are sufficiently serious, his Complaint still fails to include sufficient “factual content” to show that any Defendant acted with “deliberate indifference” to his needs. Plaintiff alleges in his Complaint that various medical personnel at RJD have prescribed medication for his condition which he

1 claims is not as helpful as a medication he was previously prescribed.¹ Plaintiff also
 2 claims that he has been wrongfully denied “therapeutic shoe,” which he alleges is
 3 required for his medical condition.² Plaintiff then filed a number of grievances and seeks
 4 to hold liable the Defendants who responded to these grievances. In these grievances,
 5 Defendants Roberts, Lewis, and Glynn agreed with the course of treatment that Plaintiff
 6 was receiving and declined to direct that Plaintiff be prescribed the medication of his
 7 choice.

8 While Plaintiff concludes Defendants acted with deliberate indifference by failing
 9 to prescribe the medication he believed was appropriate, his Complaint lacks the “further
 10 factual enhancement” which demonstrates any Defendant’s “purposeful act or failure to
 11 respond to [his] pain or possible medical need,” and any “harm caused by [this]
 12 indifference.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557); *Wilhelm v.*
 13 *Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citing *Jett*, 439 F.3d at 1096). This is
 14 because to be deliberately indifferent, Defendants’ acts or omissions must involve more
 15 than an ordinary lack of due care. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012)
 16 (citation and quotation marks omitted); *Wilhelm*, 680 F.3d at 1122. “A difference of
 17 opinion between a physician and the prisoner—or between medical professionals—
 18 concerning what medical care is appropriate does not amount to deliberate indifference.”
 19 *Snow*, 681 F.3d at 987 (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989));
 20 *Wilhelm*, 680 F.3d at 1122-23. Instead, Plaintiff must plead facts sufficient to “show that
 21

22
 23 ¹ Plaintiff has made almost identical claims, with different dates and individuals, in at least four other
 24 actions. A court “may take notice of proceedings in other courts, both within and without the federal
 25 judicial system, if those proceedings have a direct relation to matters at issue.” *Bias v. Moynihan*, 508
 26 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir.
 27 2002)). The Court therefore takes notice of the following cases: *Arellano v. Officer Hodge, et al.*, S.D.
 28 Cal. Civil Case No. 3:14-cv-00590-JLS-JLB; *Arellano v. Sedighi, et al.*, S.D. Cal. Civil Case No. 3:15-
 cv-02059-AJB-BGS; *Arellano v. Milton, et al.*, S.D. Cal. Civil Case No. 3:15-cv-02069-JAH-NLS;
Arellano v. Self, et al., S.D. Cal. Civil Case No. 3:15-cv-02300-AJB-JMA.

² Plaintiff makes the identical claim in *Arellano v. Officer Hodge, et al.*, S.D. Cal Civil Case No. 3:14-
 cv-00590-JLS-JLB.

the course of treatment the doctor[] chose was medically unacceptable under the circumstances and that the defendant[] chose this course in conscious disregard of an excessive risk to [his] health.” *Snow*, 681 F.3d at 988 (citation and internal quotations omitted).

Plaintiff’s Complaint, however, contains no facts sufficient to show that any of his doctors or other medical officials acted with deliberate indifference to his plight by “knowing of and disregarding an[y] excessive risk to his health and safety.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Accordingly, the Court finds that Plaintiff’s Complaint fails to state an Eighth Amendment inadequate medical care claim against any named Defendant, and that therefore, it is subject to sua sponte dismissal in its entirety pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

Because Plaintiff is proceeding without counsel, however, and the Court has now provided him “notice of the deficiencies in his complaint,” it will also grant Plaintiff an opportunity to amend it. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

III. Conclusion and Orders

Good cause appearing, the Court:

1. **GRANTS** Plaintiff’s Motion to Proceed IFP.
2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing monthly payments from his account in an amount equal to twenty percent of the preceding month’s income and forwarding those payments to the Clerk of the Court each time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

4. **DISMISSES** Plaintiff's Complaint for failing to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and **GRANTS** him forty-five days leave from the date of this Order in which to file an Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff's Amended Complaint must be complete in itself without reference to his original pleading. Defendants not named and any claims not re-alleged in the Amended Complaint will be considered waived. *See* CivLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended pleading supersedes the original."); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an amended pleading may be "considered waived if not repled").

5. **DIRECTS** the Clerk of Court to mail to Plaintiff, together with this Order, a blank copy of the Court's form "Complaint under the Civil Rights Act, 42 U.S.C. § 1983" for his use in amending. The Clerk may close the case.

IT IS SO ORDERED.

Dated: February 19, 2016


HON. ROGER T. BENITEZ
United States District Judge